Landmark Family Foods, Inc. d/b/a Church Square Supermarket *and* United Food and Commercial Workers Union Local 880. Cases 8–CA–37667 and 8–CA–38794

May 31, 2011

DECISION AND ORDER

CHAIRMAN LIEBMAN AND MEMBERS PEARCE AND HAYES

On November 2, 2010, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision. The Respondent filed exceptions and a supporting brief. The Acting General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Landmark Family Foods, Inc. d/b/a Church Square Supermarket, Cleveland, Ohio, its officers, agents, successors and assigns, shall take the actions set forth in the Order.

Dated, Washington, D.C. May 31, 2011

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Jun S. Bang, Esq., for the General Counsel.
Fred S. Papalardo Jr., Esq. and *Adam J. Davis, Esq. (Reminger Co., L.P.A.),* for the Respondent.
Daniel S. White, Esq. and *Eban O. McNair IV, Esq.,* for the Charging Party.

DECISION

STATEMENT OF THE CASE

JEFFREY D. WEDEKIND, Administrative Law Judge. The consolidated complaint in these cases alleges that Respondent has violated Section 8(a)(1) and (5) of the Act in various respects since its most recent collective-bargaining agreement with the Union expired in February 2007.[1] Following several prehearing conferences, the cases were tried before me on July 12–15, 2010, in Cleveland, Ohio. Thereafter, on October 7 and 8, Respondent, the General Counsel, and the Charging Party Union filed posthearing briefs.[2] After considering the briefs and the entire record,[3] including my observation of the demeanor of the witnesses, I make the following

[1] In light of our disposition of the issues, we find no need to pass on contentions by the Acting General Counsel and the Charging Party that we should strike portions of the Respondent's brief.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In affirming the judge's conclusion that the Respondent violated Sec. 8(a)(5) of the Act by unilaterally ceasing benefit fund contributions for all unit employees and changing their health insurer, Member Hayes relies on the fact that the Respondent's actions were not consistent with any proposals pending in contract negotiations. He finds it unnecessary to rely on the judge's additional determination that the parties were not at impasse.

[1] The underlying charges and amended charges were filed by the Union between March 7, 2008 and April 29, 2010. Pursuant thereto, the General Counsel issued an Order Consolidating Cases and Second Amended Complaint on April 30, 2010. Respondent subsequently filed an answer and amended answer on May 13 and July 8, 2010, respectively.

[2] Respondent's motion to strike the Charging Party Union's brief as untimely filed is denied. The uncontroverted facts set forth in the Union's affidavit in support of accepting its brief indicate that: (1) the Union attempted to timely file the brief electronically as a Word 2010 document prior to midnight on the October 7 deadline; (2) the brief was not successfully filed at that time because the Board's e-filing system did not accept Word 2010 documents; (3) the Union eventually determined that this was the reason for the filing failure and reformatted and successfully filed the brief electronically as a Word 2003 document only 48 seconds after the deadline; and (4) the Union did not gain any advantage, or the Respondent suffer any prejudice, by the delay, as the Union did not review the briefs filed by Respondent and the General Counsel on October 7 prior to successfully filing its brief. Contrary to Respondent, and in agreement with the Union and the General Counsel, I find that these circumstances satisfy the requirements set forth in Section 102.111(c) of the Board's Rules for accepting a late-filed brief. See *Altercare of Wadsworth*, 355 NLRB No. 96, slip op. at 7 (2010). The Union's motion to accept the late electronic filing of its brief is therefore granted.

[3] The transcript and exhibits are corrected as set forth in my September 14 Notice to Show Cause (as modified by the General Counsel's response) and the subsequent motions to correct submitted by the General Counsel and the Charging Party (ALJ Exh. 1(a)–(c)).

FINDINGS OF FACT

I. JURISDICTION

Respondent is an Ohio corporation engaged in the retail grocery business. Respondent admits, and I find, that it has annual gross revenues exceeding $500,000 and purchases and receives goods valued over $50,000 directly from outside the State, and that it is an employer engaged in commerce as defined in Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that the Union is a labor organization as defined in Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is a family-owned grocery store located in the city of Cleveland. Si Harb is the president and general manager, and his wife, son, brother, and sister-in-law work at the store as well. (Tr. 48–49.) In addition, Respondent employs a number of employees on a full or part-time basis, including high school and college students. It also utilizes workers from Catholic Charities, who are paid through the charity unless they are retained after the initial training period (Tr. 712).

The Union has represented Respondent's employees since 1984, shortly after the store opened (Tr. 706–708, 732).[4] Until the events at issue here, the Union enjoyed a relatively good collective-bargaining relationship with Respondent, successfully negotiating numerous labor agreements, including the most recent agreement effective February 3, 2004–February 3, 2007 (Tr. 402–406, 431, 708–709; GC Exhs. 6, 77–79). The only significant, recurring dispute between the parties concerned Respondent's alleged failure to fully comply with the benefit-fund provisions of the agreements, which became the subject of employee grievances, periodic audits, and court enforcement actions by the Union and/or its pension and health and welfare funds (Tr. 144–149, 166–169, 377–378, 477–480, 487–489, 639, 723–726, 855; GC Exhs. 33, 50, 80, 88–89, 96).

Although an "independent" store, Respondent is a member, along with certain other area stores, of the Eagle Supermarket Corporation, which operates as the purchasing agent for the stores. Harb has served as president of Eagle since 1995, and he and the other owners also serve as its shareholders and directors. (Tr. 55–61.)

Like Respondent's employees, the employees of the other member stores are represented by the Union. Accordingly, as a matter of convenience, Eagle's attorney, David Levine, has historically served as the bargaining agent for all the member stores and negotiated their individual labor agreements with the Union together, simultaneously (Tr. 206–207, 1177).

In 2007, Levine's counterpart for the Union was Michael Krzys. Krzys was the coordinator of the Union's Cleveland office, and also served on the board of trustees of the Union pension and health and welfare funds (Tr. 188, 328). Krzys and Levine had negotiated several contracts together (Tr. 405–406), and they met again in mid-January 2007 to begin negotiating new agreements covering the employees of Respondent and the three other member stores at that time: Forest Hills Family Foods, Mentor Family Foods, and Holzheimer's Family Foods (Tr. 214).[5]

Over the next 12 months, through January 8, 2008, Krzys and Levine held a total of nine bargaining sessions, either in person or over the phone. However, unlike in the past, they were unable during that time to reach a new agreement for any of the four stores.[6] The primary problem areas were contributions to the Union pension and health and welfare funds, and (to a lesser extent) wage rates; specifically, the increased employer costs associated with these items due to rising medical costs and increases in minimum funding standards and wages mandated by the 2006 Pension Protection Act and Ohio's

[4] As described in the contract, the unit consists of all food store and meat department employees, excluding regular clerical personnel, managers, and other supervisors as defined in the Act. (GC Exh. 6.) The record is unclear whether any of Harb's family members have historically been included in the unit. William Marks, a Union business agent, testified that they are excluded (Tr. 1251–1252, 1270–1271), which is consistent with Section 2(3) of the Act and Board law. See, e.g., *Union Mfg. Co*., 291 NLRB 436 (1988) (a child or spouse of the employer is not a statutory employee). However, as discussed below, Respondent proposed during negotiations that all family members be excluded from the Union pension and health and welfare funds—a proposal which seems unnecessary if they were already excluded from the unit and participated in the plans, if at all, only voluntarily.

[5] Prior to the first bargaining session, the Union requested Respondent and the other member stores to execute an extension of the 2004–2007 contracts. Levine advised Krzys that the stores were unwilling to do so, but would continue to abide by all of the contract terms during the negotiations, including the pension, health and welfare, and wage provisions. (Tr. 1107–1108, 1173–1175, 1180–1181.) Apparently based on this representation, the Union contended at that time that Respondent had orally agreed to extend the contract; indeed, the Union filed an unfair labor practice charge over the matter (Tr. 329, 624). However, the General Counsel declined to issue a complaint on the charge, and does not contend in this proceeding that the contract was orally extended. Accordingly, for purposes of this decision, I have assumed that the contract was not extended (although my conclusions would be the same either way).

[6] Counsel for the General Counsel contends that the parties did, in fact, reach an agreement in November 2007. See GC's opening statement (Tr. 21), and posthearing brief (p. 21, fn. 23). This is consistent with Krzys' contention at that time, and with his subsequent testimony at the instant hearing, that Levine had verbally agreed during their November 6 conference call (the parties' seventh bargaining session) to the terms of a new contract on behalf of Respondent. See GC Exh. 14; and Tr. 272–275, 424. However, Levine denied that he had done so (GC Exhs. 13, 27; Tr. 1119–1120), and Krzys' otherwise detailed bargaining notes inexplicably make no mention of such an agreement (GC Exh. 23; Tr. 473). Moreover, the tone and content of Krzys' subsequent November 30, 2007 correspondence to Levine (GC Exh. 12), which enclosed a "Memorandum of Agreement" (MOA) for signature, appears more consistent with a final offer than a written memorial of a prior verbal agreement. Indeed, Krzys' cover letter specifically refers to the enclosed MOA as an "offer" and does not even mention the November 6 conference call. See also Krzys' subsequent December 5 letter to Levine (GC Exh. 14), in which Krzys refers to the MOA as the Union's "counteroffer." Finally, the Union never filed an unfair labor practice charge over the matter (Tr. 425), and the complaint does not allege that Respondent violated the Act by failing to execute the MOA. I therefore discredit Krzys in this respect, and, contrary to the General Counsel, find that no agreement was reached in November 2007 (although, again, the issue is not critical to my conclusions).

minimum-wage law, respectively. (Tr. 214–295, 413, 1101–1119; GC Exhs. 23, 25.)

The General Counsel does not allege that Respondent bargained in bad faith over a successor contract during this first year of negotiations. See GC Exh. 1(q) (complaint); and GC Br. 2–3 (summary of issues). However, the complaint does allege that Respondent violated Section 8(a)(5) away from the bargaining table by failing, over the last several months of this period, to continue making benefit fund contributions for certain unit employees as set forth in the expired contract. The complaint also alleges several additional violations beginning February 1, 2008, immediately after the first year of negotiations. Specifically, it alleges that Respondent ceased making benefit fund contributions for all of the unit employees, unilaterally changed their health insurance provider, and conditioned a new agreement on the Union limiting or stopping an audit of Respondent's books by the pension fund.[7]

Finally, the complaint also alleges several additional violations since August 2009. Specifically, it alleges that Respondent failed to timely provide relevant and necessary information to the Union regarding the bargaining unit and Respondent's contract proposals, threatened to close the store rather than sign an agreement, and otherwise bargained in bad faith with no intention of reaching a new agreement.

B. The 2007–2008 Allegations

1. Respondent's failure to make benefit fund contributions for certain employees from September 6, 2007–January 31, 2008

It is well established that benefit fund contributions are mandatory subjects of bargaining that generally survive expiration of the contract. Accordingly, in the absence of a contrary agreement or other applicable exception, an employer violates Section 8(a)(5) by failing to continue making such contributions after the contract expires. See, e.g., *Concourse Nursing Home*, 328 NLRB 692, 702 (1999); *N.D. Peters & Co*., 321 NLRB 927, 928 (1996); and *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986). This is true regardless of the employer's good faith or motive for failing to continue the mandatory terms, *Local 777, Democratic Union Organizing Committee (Yellow Cab) v. NLRB*, 603 F.2d 862, 890 (D.C. Cir. 1978), or whether the failure to do so affected only some rather than all of the unit employees, *Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747, 755 (6th Cir. 2003). See also *Castle Hill Health Care Center*, 355 NLRB No. 196, slip op. at 37–38 (2010).

Applying these principles, in agreement with the General Counsel, I find that Respondent violated Section 8(a)(5) by failing to make contributions to the Union pension and health and welfare funds for certain employees from September 6, 2007 through January 31, 2008. First, there is no dispute that articles IX and X of the expired contract (GC Exh. 6) required Respondent to make such contributions for all eligible unit employees. Second, a preponderance of the evidence, including an audit summary completed at the request of the benefit funds, shows that Respondent did, in fact, fail to make pension and/or health and welfare contributions for several eligible employees during the relevant 5-month period. (GC Exh. 70; Tr. 525.)[8] Respondent has failed to offer any substantial or credible evidence to rebut this evidence, i.e., to show that the employees were properly excluded because they were not eligible. Although Harb offered one or more reasons why some of these employees were not eligible, his testimony appeared speculative and was unsupported by, or inconsistent with, the documentary evidence. See Tr. 874–884; and GC Exh. 116. Indeed, Respondent appears to concede this, as its posthearing brief makes no mention of the testimony.

Respondent has also failed to show that it was otherwise privileged not to make contributions for these employees. The only defense offered by Respondent is that the parties had long had an informal "handshake" agreement or understanding not to sign up or include all employees in the unit. Harb testified that the Union assured him that, if he identified a few people in the unit, it would "overlook the others." He testified that the Union repeatedly gave him this informal promise during past contract negotiations in order to get him to agree to the benefit fund provisions, and that it had become a common practice to only sign up a few employees (Tr. 740–741, 861–865). Thus, although not explicitly stated either at the hearing or in its posthearing brief, Respondent's defense appears to be that its unilateral failure to make contributions on behalf of certain employees was lawful because it was consistent with the parties' intent and/or past practice.

Assuming this is, in fact, Respondent's defense, it is without merit. As noted supra (fn. 4), the recognition clause (article I) of the 2004–2007 contract clearly states that "all food store and meat department employees" are included in the unit, subject only to certain specified exceptions.[9] It is well established that parol evidence is not admissible to vary the terms of such unambiguous contract provisions. See, e.g., *W. J. Holloway & Son*, 307 NLRB 487 fn. 1 (1992) (parties' oral understanding that contract would apply only to current job could not be given

[7] Respondent and the Union executed a non-Board settlement (i.e. a settlement without the General Counsel's signature) of these allegations in October 2008 (GC Exh. 45). However, Respondent failed to comply with it. Although Respondent's pretrial answer denied that it failed to comply with the settlement in various respects as alleged in complaint paragraph 11(B), Respondent's primary legal representative in this proceeding, Fred Papalardo Jr., readily admitted the allegation in both his opening statement (Tr. 36–37) and his subsequent testimony as a witness (Tr. 995).

[8] The audit indicates that Respondent substantially underpaid pension and/or health and welfare contributions for the following employees: Terry Lyons (pension), Melody Moore (pension), Ronald Blair (pension), Natessia Knox (pension), Darlia Steele (pension), Latricia Walker (pension), Ruth Henderson (health and welfare), Clementine Johnson (both), Eddie Scott (both), Willie Nettles (both), Delshawn Bizzel (both), and Lloyd Booker (both). The audit showed that Respondent also failed to make health and welfare contributions for Paul Harb, Si Harb's son. See discussion at fn. 4, supra.

[9] The contract also contains a union-security provision (article II) requiring that all unit employees become and remain members of the Union after 30 days. It further provides (article XVII) that "this agreement represents a complete and final understanding on all bargainable issues between the Employer and the Union."

effect because it would "not merely explain or clarify but rather invalidate and nullify the parties' written agreement"). See also *Sheehy Enterprizes*, 353 NLRB No. 84 (2009), reaffirmed and incorporated by reference, 355 NLRB No. 83 (2010). Accordingly, Harb's testimony cannot properly be given effect for this purpose, i.e., to show that the parties' intent was contrary to the plain language of the contract.

As for the parties' past practice, Board precedent indicates that parol evidence may be admissible for this purpose, i.e., to show that the parties have an established past practice inconsistent with their expired contract. See *Sacramento Union*, 258 NLRB 1074, 1075 n. 8 (1981) ("employer may not, absent an impasse or waiver by the union, unilaterally change established practices with respect to mandatory subjects of bargaining, even if these practices may have constituted a deviation from the letter of the parties' expired agreement"). Accord: *Smith's Industries v. NLRB*, 86 F.3d 76, 80 (6th Cir. 1996). See also *Dixie Sand & Gravel*, 231 NLRB 6, 8 (1977) (employer's past failure to insist on strict compliance with contractual notice-of-reopening provisions estopped it from asserting union's most recent lack of compliance as defense to refusal-to-bargain allegation); and *Oakland Press*, 229 NLRB 476, 479 (1977), affd. in relevant part 606 F.2d 689 (6th Cir. 1979) (reaching similar conclusion).

However, while Harb's testimony may be admissible and relevant evidence for this purpose, it is not credible evidence. First, the testimony lacks independent evidentiary support. Although the record includes a number of employee lists (all submitted by the General Counsel), Respondent does not cite any of them as evidence that Respondent has employed more workers over the years than the Union has claimed or Respondent made benefit contributions for. In any event, the record indicates that there are several possible explanations why some of these lists may show more employees than the Union has claimed over the years. For example, undisputed testimony indicates that there is a high employee turnover rate at the store (Tr. 291, 470, 1219–1220). Further, there are a variety of contractual conditions that must be satisfied before a unit employee is eligible for benefit fund contributions. Thus, employees might well have been properly excluded from the unit and/or ineligible for contributions under the contract. Alternatively or in addition, Respondent may have failed to timely provide sufficient employee information to the Union to determine who was in the unit and eligible for the benefit plans. Respondent has not adequately excluded these possible explanations.

Second, Harb's testimony is inconsistent with other substantial evidence. Both Krzys and Levine denied that there was any oral "handshake" agreement (Tr. 453, 461–466, 1129–1130). William Marks, a Union business agent who actually serviced the store in the mid-1990s, likewise denied that there was ever a deal to "look the other way" (Tr. 1223). Further, it is undisputed that the Union and/or the funds repeatedly attempted to enforce the contract language by visiting the store to "sign up" employees,[10] conducting periodic audits of Respondent's employment records, and filing complaints in Federal court where the audits revealed discrepancies.[11] It makes no sense that Harb would continue to sign new contracts in reliance on the Union's informal assurances if the Union and/or the funds had repeatedly reneged on those assurances.[12]

In sum, Respondent has failed to establish either that a contrary past practice existed, or that the practice occurred "with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." *Caterpillar, Inc*., 355 NLRB No. 91, slip op. at 3 (2010), quoting *Sunoco, Inc*., 349 NLRB 240, 244 (2007). Accordingly, I find that Respondent violated Section 8(a)(5) of the Act as alleged.

2. Respondent's cessation of benefit fund contributions for all unit employees and unilateral change in their health insurer

As indicated above, the General Counsel alleges that, beginning February 1, 2008, Respondent further violated Section 8(a)(5) by unilaterally ceasing pension and health and welfare contributions for all unit employees and changing their health insurance provider. I find that a preponderance of the evidence supports this allegation as well.

There is no real dispute that Respondent did, in fact, unilaterally cease making contributions to the Union pension and health and welfare funds for all employees and change their health insurance provider (to Anthem Blue Cross Blue Shield) effective February 1, 2008. Although Respondent's pretrial answers denied or failed to fully admit that Respondent did so, Harb admitted the unilateral changes at the hearing (Tr. 74–94, 139–140, 819–820, 871) and they are well documented (GC Exhs. 2, 4, 22, 27, 71–72, 108–110). Respondent, however, argues that it was privileged to make the unilateral changes because the parties' prior contract had expired and the negotiations over a new contract reached impasse in January 2008. See R. Br. 4–9; GC Exh. 1(x); and Tr. 36.[13] Again, Respondent's argument is without merit.

[10] See, e.g., Tr. 709, 717, 1124, and 1211–1224. Marks once even chased an employee into the bathroom to sign him up (Tr. 1220–1221, 1234).

[11] The allegations were always settled, with Respondent agreeing to pay the allegedly delinquent contributions, as well as interest and attorneys fees at least in some instances, albeit without admitting wrongdoing (Tr. 144–149, 166–169, 856–857, 1191; GC Exhs. 50, 80, 96).

[12] As indicated above (fn. 6), there are also reasons to question Krzys' credibility as a witness in this proceeding. However, with respect to this particular issue, I find that Krzys' testimony is more believable as it is corroborated by Levine (and Marks) and is consistent with the record as a whole.

[13] Respondent has not contended that the February 1 unilateral changes were compelled by a dire financial emergency or other economic exigency. See *The Ford Store*, 349 NLRB 116, 120 (2007) and cases cited there. See also *Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747, 765 (6th Cir. 2003). Although Respondent contends that it "could not afford the proposed and/or mandatory increases," and that it told the Union this (see, e.g., GC Exh. 1(x), affirm. defense #6; and R. Br. 2–3, 8–9), it has not contended that a dire financial emergency or other economic exigency prevented it from maintaining the current level of benefits or compelled it to cease all benefit fund contributions and substitute a different health insurer without bargaining to an overall impasse. In any event, I find that Respondent has failed to show that such a dire financial emergency or economic exigency existed as of February 1, 2008.

Although impasse is one of the generally recognized exceptions permitting unilateral changes, the law is clear that an employer's post-impasse changes cannot be substantially different from the terms of its prior offers. See, e.g., *Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 886 (D.C. Cir. 1997) ("When impasse occurs, an employer may implement only those changes reasonably falling within its pre-impasse proposal."); and *Atlas Tack Corp*., 226 NLRB 222, 227 (1976), enfd. 559 F.2d 1201 (1st Cir. 1977) (impasse enables an employer to make unilateral changes that are "not substantially different or greater than any which the employer . . . proposed during the negotiations").

Here, the evidence fails to establish that Respondent had proposed either of its changes at the bargaining table prior to implementing them. Indeed, it is undisputed that Respondent made no written proposals whatsoever during the first year of negotiations. See *Stone Boat Yard*, 264 NLRB 981, 982 fn. 3 (1982) ("an employer [must] provide a union with a written copy of its proposed contract changes prior to unilaterally implementing them"), enfd. 715 F.2d 441 (9th Cir. 1983), cert. denied 466 U.S. 937 (1984). Further, the record indicates that Respondent's only formal verbal proposals prior to February 1 with respect to future coverage under the Union benefit plans were to: (1) eliminate health insurance coverage for dependents; (2) increase the health insurance eligibility waiting period for full-time employees from 6 to 12 months; (3) reduce coverage for part-time grocery clerks (which Respondent proposed as a new classification for this purpose based on a similar provision in the Cleveland major food industry multiemployer contract); and (4) disqualify students from participating in the pension plan. (Tr. 224–295; GC Exh. 23.)[14]

At one point during the parties' discussions at the fourth session on July 2, Levine did suggest that employees "pay" for the pension and "copay" their health and welfare benefits. However, Levine did not specify or explain what he meant by this and Krzys rejected the idea. At the same meeting, Levine also asked "what if" Respondent "drop[ped] out" of one or both Union plans, to which Krzys replied that employees would lose their benefits and the pension would be unfunded. See GC Exh. 23; and Tr. 245. However, Levine specifically admitted at the hearing that at no time prior to February 1, 2008 did he actually propose ceasing employer pension and health and welfare contributions altogether and/or changing the health insurer for all employees (Tr. 1147–1148, 1155–1156). Krzys also confirmed this (Tr. 324–326, 329). And Respondent's posthearing brief does not contend otherwise (indeed, it does not even address the issue).

Accordingly, it is irrelevant here whether there was an impasse in January 2008, as Respondent's unilateral changes would violate Section 8(a)(5) regardless. See *Peerless Roofing Co*., 247 NLRB 500 fn. 1 (1980), enfd. in relevant part 641 F.2d 734, 735 (9th Cir. 1981) (finding it unnecessary to decide whether an impasse occurred, as employer's cessation of payments into various funds was not reasonably encompassed in any of employer's offers or positions during bargaining).

Moreover, even assuming arguendo that Respondent's changes were sufficiently similar to its previous bargaining proposals, Respondent has failed to establish that a genuine impasse existed as of February 1, 2008. A genuine impasse is "synonymous with a deadlock," where "neither party is willing to move from its respective position." *Hi-Way Billboards, Inc*., 206 NLRB 22, 23 (1973), enf. denied on other grounds 500 F.2d 181 (5th Cir. 1974). A number of factors are considered in determining whether a genuine impasse has been reached, including the bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue(s) over which there is disagreement, the contemporaneous understanding of the parties regarding the state of the negotiations, and the parties' flexibility and willingness to compromise and continue bargaining. *Castle Hill Health Care Center*, supra, 355 NLRB No. 196, slip op. at 29–30; *Duane Read, Inc*., 342 NLRB 1016 (2004); *Grosvenor Resort*, 336 NLRB 613, 616 (2001), enfd. mem. 52 Fed. Appx. 485 (11th Cir. 2002); *Grinnell Fire Protection Systems Co.,* 328 NLRB 585 (1999), enfd. 236 F.3d 187 (4th Cir. 2000), cert. denied 534 U.S. 818 (2001); and *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).[15]

Here, the record indicates that the parties were usually, if not always, able in the past to complete negotiations within a year, and that the primary issues delaying a new agreement in this instance were critical to both parties. However, both parties demonstrated flexibility and a willingness to compromise on these issues during the negotiations. For example, Levine advised Krzys at their fourth session in July that the stores could not afford the Union's proposed 30-cent pension increase because of increased competition and decreased volumes and margins. However, at their next meeting in August, Levine stated (in the presence of Harb, who also attended the meeting) that Respondent would pay the increase if Respondent could pay the retroactive amounts due since February 2007 over time and the Union agreed to certain other changes (e.g. the new part-time grocery clerk classification with reduced wages and benefits). (Tr. 243–245, 252–260; GC Exh. 23.)

[14] As noted earlier (fn. 6), General Counsel Exhibit 23 consists of Krzys' bargaining notes. (There are no bargaining notes by Levine in the record.) Wherever relevant, I have given substantial weight to these notes in resolving inconsistencies in the testimony about what was or was not said, proposed, and/or agreed to during the 2007–2008 negotiations.

[15] The Board has also held that serious, unremedied unfair labor practices preclude a genuine impasse. See, e.g., *Lafayette Grinding Corp*., 337 NLRB 832 (2002) (unilateral cessation of contributions to union health and welfare fund, which were a key issue in the contract negotiations); *Royal Motor Sales*, 329 NLRB 760, 762–764 (1999), enfd. sub nom. *Anderson Enterprises v. NLRB*, 2 Fed. Appx. 1 (D.C. Cir. 2001) (unpub.) (direct dealing with employees regarding the very issue over which employer asserted parties were at impasse); and *Northampton Nursing Home, Inc*., 317 NLRB 600 (1995) (failure to pay contractually mandated wage increase and benefit fund contributions). Here, as discussed above, Respondent had been unlawfully failing to make benefit fund contributions on behalf of certain employees for several months prior to February 2008. However, it is unnecessary to decide whether this unremedied 8(a)(5) violation was sufficiently serious to preclude impasse, as it is clear, based on other relevant factors, that there was no impasse as of February 1, 2008.

Similarly, the Union indicated at the third, fifth, sixth, and seventh sessions that it would agree or was open to considering some of Respondent's verbal proposals, including the 12-month waiting period for full-time employees to become eligible for the medical plan and the new part-time grocery clerk classification (Tr. 237–243, 252–272, 1106, 1152–1153, 1198; GC Exh. 23). Indeed, Krzys subsequently presented draft agreements to Levine on November 30, 2007 and January 8, 2008 (GC Exhs. 12, 15) that included one or both of these items, and also eliminated the retroactive pension increase altogether for the first year through February 2008 (which meant that the employees would not receive any benefit accrual for hours worked during that period).

Further, after their ninth session on January 8, 2008, the parties scheduled another meeting for February 1, and actually met and bargained that day. Levine made several new verbal proposals at that time relating to wages and benefits, including creating a new part-time clerk classification under which all part-time clerks, rather than just part-time grocery clerks as previously proposed, would receive lower benefits. Levine also proposed eliminating bonuses, which he had initially proposed in August 2007, but was not included in the Union's January 8 draft agreement. Moreover, the parties also held four more bargaining sessions, either by phone or in person, on February 4 and 27, March 31, and April 2, 2008. The Union continued to demonstrate flexibility and a willingness to compromise during these sessions. Indeed, on March 21, it sent another draft agreement to Levine that included both of Respondent's new proposals regarding part-time clerks and bonuses. (Tr. 298–309, 317–383, 393–394; GC Exhs. 20, 23, 25.)[16]

Finally, neither party asserted during the January 8 or February 1 sessions that the negotiations were at impasse. The only time during the first year that the parties' communications indicated that the parties might be at or near an impasse was in late November 2007. At that time, Krzys sent Levine what could reasonably be interpreted as a final offer (see fn. 6, supra), and Levine sent Krzys what could reasonably be interpreted as an assertion that the negotiations were at impasse.[17] However, Levine assured Krzys in a subsequent conference call on December 13 that he did not intend to terminate negotiations (Tr. 285–286; GC Exh. 23). Further, Respondent has never specifically contended in the instant proceeding that the parties were at impasse in November 2007.

In any event, as the Supreme Court has noted, "impasse is only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken, through either a change of mind or the application of economic force.'" *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 412 (1982). See also *Chicago Typographical Union Local 16 v. Chicago Sun-Times*, 935 F.2d 1501, 1508 (7th Cir. 1991) ("After final offers come more offers."). Further, once an impasse is broken, the employer's right to unilaterally implement its bargaining proposals is extinguished. *Jano Graphics, Inc*. 339 NLRB 251 (2003). Here, as discussed above, the parties continued to meet and negotiate in a meaningful manner over wages and benefits after November 2007. Thus, even assuming arguendo that the parties reached an impasse in November 2007, I find that it was impermanent, and broke well before February 1, 2008.

Respondent has also asserted in its position statements that the negotiations reached an impasse *after* February 1. See GC Exh. 27.[18] And there appears to be some support for this, as Levine asserted for the first time at the April 2 session that Respondent and Forest Hills were "losing money" (Tr. 379–383; GC Exh. 21, 23), and the parties did not meet again for over 17 months. However, an impasse after February 1 is irrelevant to whether the February 1 unilateral changes were unlawful. See *Northwest Graphics, Inc*., 343 NLRB 84, 90–92 (2004) (impasse postdating employer's unilateral implementation of its bargaining proposals is irrelevant).

In any event, I find that the record as a whole fails to establish that the negotiations reached a bona fide impasse after February 1. First, the February 1 unilateral changes precluded any such valid impasse from arising. See cases cited at fn. 15, supra. Second, contrary to Respondent's position statements, Levine had assured the Union at the April 2 session that the parties were not at impasse (Tr. 379; GC Exh. 23). Third, the Union continued to request additional meetings after the April 2 session, both in late April and again in late October 2008, shortly after the parties executed a non-Board settlement agreement of the 2007–2008 allegations (which, as noted above, fn. 7, Respondent promptly violated).

Moreover, the Union also repeatedly requested Respondent to provide financial information supporting Levine's April 2 assertion that it was "losing money" (GC Exhs. 21, 23, 46, 49). Contrary to Respondent's posthearing brief (p. 2), there is no credible or substantial evidence that the Union did so simply to "harass [Respondent] and justify charges filed with the NLRB." It is well established that an employer's assertion of inability to pay triggers a duty to provide supporting financial information on request. *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956).

[16] The foregoing facts (all or most of which Respondent's posthearing brief ignores) distinguish *CalMat, Inc*., 331 NLRB 1084 (2000), the primary case cited by Respondent as support for finding an impasse. See *Laurel Bay Health & Rehabilitation Center*, 353 NLRB 232 (2008), reaffirmed and incorporated by reference 356 NLRB No. 3 (2010).

[17] The letter stated that "despite protracted negotiations, we unfortunately have been unable to reach an agreement;" noted that Respondent had not extended the agreement during negotiations but had complied with its terms; and advised the Union, to avoid any "misunderstanding," that "there will be no extension of the 2004–2007 agreement as of February 3, 2008" (GC Exh. 13).

[18] General Counsel Exhibit 27 consists of two position statements that Levine filed with the NLRB investigator on behalf of Respondent and Forest Hills on April 6. (The record indicates that the other two stores, Mentor and Holzheimer, had reached new agreements with the Union by that time.) The statements specifically asserted that the parties "have been unable to reach agreement" and "seem to be at an impasse." Nevertheless, the General Counsel's posthearing brief (p. 41) argues that Levine did not claim the existence of an impasse between Respondent and the Union, apparently because the latter, "impasse" language was not included in the position statement for Respondent, but only in the companion position statement for Forest Hills. However, the Union's posthearing brief (p. 34) appears to concede, and I find, that the two statements may appropriately be read and evaluated together under the circumstances.

Further, there is nothing particularly suspicious about the timing of the Union's request under the circumstances. Whether an employer has claimed an inability to pay within the meaning of *Truitt* may depend on a variety of factors, and is not always easy to discern. See *Stella D'oro Biscuit Co*., 355 NLRB No. 158, slip op. at 2–6 (2010). Here, as indicated above, the record confirms that Levine had previously stated at the July 2007 session that the stores could not afford the pension increase. However, he indicated at the very next session in August that Respondent would pay the increase if it could pay the retroactive amounts due in installments and the Union agreed to certain other changes. And it was not until the April 2008 session that Levine claimed Respondent was actually losing money.

In these circumstances, I find that, even if Krzys would have been justified in demanding financial information as early as July 2007, the evidence fails to establish that the Union's request in April 2008 was motivated by bad faith. Cf. *Harmon Auto Glass*, 352 NLRB 152, 154, 157 (2008), reaffirmed 355 NLRB No. 66, slip op. at 1 fn. 3 (2010) (although the employer had previously stated at the first bargaining session that it was having financial trouble, was "bleeding money," and could not afford to continue the current contract, the union's failure to request financial information until the fourth/last session did not warrant an inference of bad faith as that was the first time the employer clearly stated that the company could not remain in business if its proposal was not accepted). Rather, the record indicates that the Union sought the information pursuant to its statutory rights and responsibilities as the employees' exclusive bargaining representative.

Accordingly, for all of these reasons, I find that the record as a whole fails to establish that a bona fide impasse existed after February 1, 2008. Indeed, I would reach this conclusion even without considering the impact of Respondent's prior, unlawful unilateral changes. Although the General Counsel does not allege that Respondent's subsequent failure to respond to the Union's requests to bargain and to provide financial information was unlawful,[19] such circumstances are nevertheless relevant in evaluating the existence of a bona fide impasse. See, e.g. *Essex Valley Visiting Nurses Assn.*, 343 NLRB 817 (2004) (unilateral transfer violation); and *Royal Motor Sales*, 329 NLRB 760, 772–773 (1999), enfd. 2 Fed. Appx. 1 (D.C. Cir. 2001) (unpub.) (finding that union's outstanding information request precluded a bona fide impasse even in the absence of an allegation or finding that the employer's delay or failure to provide the information was unlawful).

3. Respondent's alleged insistence that the Union limit or stop an audit of Respondent's books by the pension fund

As indicated above, the General Counsel also alleges that Respondent has violated Section 8(a)(5) since February 1, 2008 by insisting, as a condition of reaching a new agreement, on a nonmandatory subject of bargaining; specifically, that "the Union agree to limit and/or stop an audit of its books and accounts by the Union's pension fund" (GC Exh. 1(q), par. 10(A)). For the reasons set forth below, I find that the General Counsel has failed to prove this particular allegation by a preponderance of the evidence.

It is well established that Section 8(a)(5) does not preclude an employer from introducing nonmandatory subjects (i.e., subjects outside the scope of "wages, hours, and other terms and conditions of employment") into the bargaining process. However, an employer may not insist upon a nonmandatory subject of bargaining as a condition of reaching any agreement. *NLRB v. Wooster Div. of Borg-Warner Corp*., 356 U.S. 342, 349 (1958); and *Oil, Chemical and Atomic Workers Local 3-89 v. NLRB*, 405 F.2d 1111, 1116 (D.C. Cir. 1968).

Here, Respondent admits in its amended answer (GC Exh. 1(x), par. 10(b)) that limiting or stopping a pension fund audit is not a mandatory subject of bargaining. However, Respondent denies that it insisted on this as a condition of reaching agreement. For the reasons set forth below, I find that the record supports Respondent; specifically, that, although Respondent repeatedly raised the issue of audits, it did not condition any agreement on the Union limiting or stopping a pending audit.[20]

The record confirms that audits were a major concern for Respondent. As indicated above, audits were a recurring area of disagreement between the parties. Further, there were actu-

[19] The Union apparently reads the complaint to include these allegations, as its posthearing brief argues extensively (pp. 61–72) that Respondent violated the Act in both respects, i.e., both by failing to timely provide the financial information and by failing to meet and bargain in good faith from April 2008–August 2009. However, as noted in the General Counsel's posthearing brief (p. 55, fn. 79), the Union withdrew the information allegation from its unfair labor practice charge after Respondent eventually provided the requested financial information in October 2009 (see discussion infra). See also CP Br. 43 (acknowledging that it withdrew that portion of the charge). Further, the complaint does not specifically allege that Respondent's failure to timely provide the financial information or to meet and bargain between April 2008 and August 2009 violated Section 8(a)(5). Although the complaint does contain a general allegation (par. 10(C)) that Respondent failed to bargain in good faith "by its overall conduct, including [the unilateral changes and insistence on limiting or stopping the pension audit]," the General Counsel has never asserted that this paragraph is intended to allege the violations now urged by the Union. Indeed, the General Counsel specifically stated, both at a prehearing conference and at the outset of the hearing, that the allegations in the subsequent paragraph (par. 11)—which allege that Respondent "failed to resume good faith bargaining with the Union for a successor contract and to provide [its] most recent financial statements and tax returns" after executing the October 2008 non-Board settlement—were *not* being alleged as an unfair labor practice. See Tr. at 8–9. See also the GC's posthearing brief at 2–3 (summary of issues). This is fully consistent with the complaint's operative 8(a)(5) allegation (par. 17), which does not reference paragraph 11. Accordingly, it is improper to consider the Union's contrary arguments at this point, or to find that Respondent violated the Act in these respects. See *Teamsters Local 282 (E.G. Clemente Contracting)*, 335 NLRB 1253, 1254 (2001).

[20] Contrary to the Union's posthearing brief (pp. 63–64), the alleged violation here is limited to conditioning an agreement on limiting or stopping a pending audit; there is no allegation that Respondent unlawfully conditioned an agreement on limiting or stopping future audits generally. This is clear, not only from the quoted language from the complaint above, but also from the General Counsel's opening statement (Tr. 21) and posthearing brief (pp. 2 and 47) (citing *Jerry Cardullo Ironworks, Inc*., 340 NLRB 515, 519 (2003)).

ally audits pending against both Respondent and Forest Hills during the entire period of negotiations between February 2007 and April 2008 (Tr. 487–499; GC Exhs. 33, 89, 91, 92, 93). Moreover, Harb specifically admitted at trial that the "number one" issue going into the contract negotiations was the audits (i.e. that he did not want to have any more of them or be taken to court for not paying contributions for certain employees), and that it was one of the reasons he believed the negotiations reached impasse after the first year (Tr. 729, 739–740, 789–790). Finally, Krzys testified, and his bargaining notes confirm, that Levine repeatedly proposed eliminating or placing limitations on audits.[21]

However, there is no evidence that Levine at any time indicated that limiting or stopping either or both of the pending audits involving Respondent and Forest Hills was a condition of reaching an agreement. Indeed, the record indicates that Respondent's primary focus, at least initially, was on eliminating or limiting future audits generally, rather than halting the pending audits. Thus, the first time Levine raised the audit issue was actually at the sixth (October 2, 2007) session. At that time, Levine proposed limiting audits to certain periods of time and deleting contract language in article IX, section 10 stating that the Union could "assist" the health and welfare fund in collecting delinquent contributions. Levine proposed taking out similar language in article X, section 5 with respect to the pension fund at the February 1, 2008 meeting. Krzys said he could not negotiate that, as it was covered by ERISA and the Union had a fiduciary duty to assist the fund. Levine replied, "Well, that's a problem," and the matter was not discussed any further. (Tr., 264–266, 307; GC Exhs. 11, 17, 23.)

The first time Levine specifically brought up the pending audits against Respondent and/or Forest Hills was at the February 4 conference call. According to Krzys, Levine tried to

> tie in the pending audits that were—at Forest Hills and the ongoing audit, or just completed audit, I should say, it was just completed at Church Square. Dave kept bringing up that he wanted a resol[ution] of the audit issue at Church Square and the pending audit that was going to happen, possibly happen, over at Forest Hills, trying to tie those into negotiations. That he felt that we should not be doing them and that . . . the funds should not be going and trying to have them pay what's properly owed by the owners of the stores.[22]
>
> . . . .
>
> He wanted the audits now called off at both Church Square and Forest Hills—he [didn't] want the audits done. (Tr. 307–308, 319.)[23]

Levine also indicated at the March 31 conference call that he wanted the pending audit at Forest Hills called off (Tr. 344; GC Exh. 23). However, Krzys responded that audits are done in a cycle or when discrepancies arise, are between the employer and the funds, and are not properly raised as part of the contract negotiations, and there was no further discussion of the matter.

Levine again brought up the audits, along with a pending grievance and the unfair labor practice charges, in the context of trying to get a global settlement, at the last conference call on April 2. However, there does not appear to have been much discussion about this (and there is no allegation here that Respondent unlawfully conditioned an agreement on withdrawal or settlement of the grievance and unfair labor practice charges). Levine at that time also again raised the issue of audits generally, stating that "if we don't stop auditing, doing an audit, on a cycle basis[,] that it's just a temporary fix because the problem will be there again." However, as before, there appears to have been little discussion of this. (Tr. 380–382, 536.)

In sum, the record confirms that Levine raised the pending audits involving Respondent and/or Forest Hills at three conference calls. However, as indicated above, this is insufficient by itself to establish the violation; rather, a preponderance of the evidence must show that Respondent actually conditioned reaching any agreement on this subject. See also *Detroit Newspaper Agency*, 327 NLRB 799, 800 (1999) ("a party 'has a right to present, even repeatedly, a demand concerning a nonmandatory subject of bargaining, so long as it [does] not posit the matter as an ultimatum'"), enf. denied on other grounds, *Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109 (D.C. Cir. 2000). I find that such evidence is lacking in this case.[24] At best, the evidence indicates that Respondent conditioned agreeing to the Union's pension and health and welfare proposals on the Union stopping or limiting future audits. However, this raises different issues,[25] was neither pled nor fully litigated, and therefore need not be addressed.

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[21] Levine denied this, testifying that he only raised the audit issue once, very briefly (Tr. 1116–1117, 1189). However, I discredit his testimony in light of Harb's admission and Krzys' notes. See fn. 14, supra.

[22] Krzys testified that Levine made these statements at the February 1 meeting, but there is no mention of this in either Krzys' February 1 notes (GC Exh. 23) or the working document Krzys presented to Levine at that meeting (GC Exh. 17). Rather, Krzys' notes indicate that stopping audits was raised a few days later at the February 4 conference call. See GC Exh. 23 ("Want audits called off; Don't want audits").

[23] Krzys' foregoing testimony suggests some confusion about whether the audits were pending in February 2008. As indicated above, I find that they were.

[24] Although the Board, in a 2008 decision, found this violation with respect to a separate but similar complaint allegation against Forest Hills, it did so based solely on Forest Hills' failure to file a timely answer to the complaint, i.e. pursuant to the General Counsel's motion for default judgment, and not on the merits. See *Forest Hills Family Foods*, 353 NLRB 411 (2008). Accordingly, the decision has no precedential weight here.

[25] These issues include whether restricting future audits by the funds is a nonmandatory subject of bargaining and, if so, whether linking mandatory and nonmandatory subjects in such a manner is unlawful. See generally *Pleasantview Nursing Home, Inc.,* 335 NLRB 961 (2001), enf. denied in relevant part 351 F.3d 747, 759–760 (6th Cir. 2003), and cases cited therein.

C. The 2009–2010 Allegations

As indicated above, the Union continued to pursue further bargaining after the April 2, 2008 session. By letter dated April 24, 2008, the Union specifically requested Respondent to submit counterproposals and to provide financial information supporting its claim of inability to pay the pension and health and welfare increases. However, the Union did not receive any response. The Union also continued to pursue its unfair labor practice charge in the first case (8–CA–37667). As previously noted (fn. 7), the parties eventually executed a non-Board settlement of those allegations in October 2008, but Respondent failed to comply with the settlement. By letters dated October 28, 2008 and January 7, 2009, the Union also again requested Respondent to bargain and provide financial information; however, no response was received. Finally, the Union and the funds also instituted an action in Federal court to recover the alleged delinquent contributions, and executed a settlement of this action with Respondent in September 2009 (GC Exh. 65). However, Respondent admittedly did not comply with that settlement either (Tr. 971–972).

Nevertheless, as noted above (fn. 19), although some of the above facts are set forth in the complaint as background, the General Counsel does not allege them as separate unfair labor practices, i.e., there is no allegation that Respondent violated Section 8(a)(5) by failing to provide counterproposals or financial information, or by otherwise bargaining in bad faith over a successor contract, between April 2008 and August 2009. Rather, the complaint alleges a wholly different set of 8(a)(5) violations beginning August 18, 2009, when the Union again requested Respondent to resume bargaining (GC Exh. 51). Specifically, the complaint alleges that Respondent unduly delayed providing the Union with relevant and necessary information regarding unit employees; failed and refused to provide other relevant and necessary information regarding Respondent's bargaining proposals; stated that it would rather close the store than execute an agreement with the Union; and, by this and various other conduct, bargained in bad faith with no intention of reaching a new agreement. For the reasons set forth below, I find that a preponderance of the evidence supports these allegations.

By August 2009, the primary actors for both Respondent and the Union had changed. Respondent was now being represented by attorney Fred Papalardo Jr. (Respondent's primary counsel in this proceeding), whom Respondent had retained in June 2009 to handle the Federal court litigation (Tr. 890–891). The Union's primary representative was attorney Eban (Sandy) McNair IV, who had attended the parties' last few bargaining sessions in early 2008, and represented the Union in negotiations over the Cleveland major food industry multiemployer contract (Tr. 332–383, 607). Neither Levine nor Krzys had any further involvement in the bargaining process.

As indicated above, on August 18, 2009, McNair sent a letter to Papalardo (GC Exh. 51) requesting that Respondent "resume bargaining" over an agreement. The letter summarized the Union's understanding of the parties' bargaining history, and requested that Respondent review the Union's last offer dated March 21, 2008, and "identify, with specificity and in writing . . . which provisions [Respondent] believes are still open." It also again requested financial statements and tax returns, as required by the October 2008 non-Board settlement.[26]

Papalardo responded by letter dated August 25. He stated that Respondent was available to resume negotiations on August 28. He also advised that Respondent was "willing to facilitate negotiations" by having the Federal district court judge assigned to the pending benefit-fund litigation (Judge Polster) serve as "mediator." He noted that Judge Polster had offered to do so "free of charge," and that it was Respondent's "position" that he would provide a "valuable service" and "do a fair and adequate job."

However, regarding what issues were still open, Papalardo "assure[d]" McNair that "the entire collective-bargaining agreement will need to be negotiated." Further, with respect to the information request, he indicated that the non-Board settlement of the unfair labor practice case was "no longer valid" as Respondent, the Union, and the funds were currently negotiating a settlement of the Federal court suit. He stated that, "upon settlement of that matter," Respondent would be willing to provide any information "as outlined in the new agreement." (GC Exh. 36.)

McNair replied by letter dated August 27. He advised Papalardo that his assertion regarding the non-Board settlement was "incorrect," as the terms of that settlement addressed issues under the NLRA and were not within the jurisdiction of the district court. He also objected to Papalardo's statement that the entire contract was open for negotiation, asserting that this statement constituted "blatant regressive bargaining" in violation of the Act. Further, he rejected the proposed meeting date as it was within 24 hours after the Union received the letter and Respondent had refused to provide the information necessary to engage in good-faith bargaining. Finally, he notified Papalardo that the Union would file another unfair labor practice charge within 5 days if it did not receive the requested financial records, a written statement of the issues Respondent believed were open, and a list of available dates for bargaining that allowed sufficient time for the Union to review the requested information. (GC Exh. 52.)

As of September 8, no response had been received to McNair's letter. Accordingly, as forewarned, the Union filed an unfair labor practice charge (Case 7–CA–38547) alleging regressive bargaining, bad-faith bargaining, and a refusal to provide financial information. (GC Exh. 102; Tr. 545.)

Two days later, on September 10, McNair received another letter from Papalardo.[27] Papalardo stated that Respondent was "ready, willing and able" to bargain in good faith, and was

[26] Paragraph 16 of the non-Board settlement provided that "[t]he Employer will immediately resume bargaining with the Union in good faith and will provide the Union with its most recent financial statements and tax returns within 30 days" (GC Exh. 45).

[27] Although the letter is dated Friday, September 4, it was not postmarked until Tuesday, September 8 (the same day the charge was filed). I take judicial notice that mail is normally postmarked on the day it is mailed, assuming it is mailed prior to the last collection time, and also that mail is normally collected and delivered on Saturdays. Thus, although dated Friday, the 4th, it appears likely that the letter was not actually placed in the mail until Tuesday, the 8th, the next business day (Monday, the 7th, was Labor Day) and the date it was postmarked.

available on "any agreeable date." However, he objected to the Union's insistence on seeing Respondent's financial statements prior to negotiating. He asserted that this seemed "contrary to beginning bargaining in good faith," and reiterated that the terms of the Federal court settlement "superseded" the non-Board unfair labor practice settlement. He requested McNair to "provide authority" for the Union's contrary positions.

Papalardo also accused McNair of bad faith for accusing him of undertaking regressive bargaining tactics. He said he was simply performing his "fiduciary duty" to represent his client's "best interest," and that "all the terms of the new collective-bargaining agreement should be on the table for negotiation" so that he could properly advise his client. Again, he requested McNair to provide authority for his contrary claim. Finally, he also again stated that Respondent was "willing" to have Judge Polster mediate the negotiations. (GC Exh. 37.)

After receiving this letter (and a copy of a subsequent September 11 email to various other recipients questioning why the Union had filed its charge), McNair concluded that Papalardo clearly was not a labor lawyer and did not understand his obligations under the NLRA (Tr. 549–550).[28] Accordingly, by letter dated September 15, he described in more detail the parties' bargaining history since the April 2, 2008 conference call (which he had participated in with Krzys), where Levine first stated that Respondent was losing money. Pursuant to Papalardo's request, he also cited various NLRB and court cases[29] addressing when an employer has a duty to provide financial information and what types of conduct evidence bad- faith bargaining. As for Judge Polster serving as a mediator, McNair stated that it was premature to decide whether a mediator was needed, and if so who the mediator should be, until the requested information had been provided and actual bargaining had begun. Finally, he identified several dates in September and October when the Union would be available to meet and bargain. (GC Exh. 53.)

The parties eventually met about 2 weeks later, on September 28. Both Papalardo and Harb were present for Respondent, and McNair was the principal negotiator for the Union. McNair proposed negotiating a new 3-year contract, and Harb said he was open to doing that. McNair also proffered a health and welfare proposal with current rates effective September 1, 2009 (GC Exh. 54). In addition, McNair explained the effects of the 2006 Pension Protection Act, i.e. why the proposed 30-cent increase in pension contributions was mandated to maintain current benefits. He said the Union would send a follow-up letter confirming this in writing. However, with respect to wages, McNair stated that he would need a list of unit employees and their classifications and wage rates since April 1, 2009 before making a wage proposal. He also again requested Respondent's financial records. Papalardo said the requested information would be provided. (Tr. 551–560, 645–647, 650, 918–922.)

A few days later, the Union sent Respondent the promised information regarding the pension plan (GC Exh. 69). The following day, October 1, Respondent emailed the Union the requested financial records (GC Exh. 103; R Exh. 7).

The parties next met on October 12. Both Papalardo and Harb were again present for Respondent. Harb began by saying that the store was in financial distress due to nonunion competition, and that this was confirmed by the financial information he provided to the Union. He complained that the Union was not taking him seriously and was trying to put him out of business. He said the parties were too far apart and he would not sign an agreement, as they would just end up in court.

Papalardo then also spoke. He said that there was no contract in existence, and no extension, and that, therefore, Respondent was free to do whatever it wanted. He further stated that Respondent wanted employees to start paying 50 percent of the contributions for both the pension and the health and welfare plans.

In response, McNair stated that the Union could shut the store down if it wanted to, by putting up a picket line, but that was not what the Union was there to do. He also acknowledged that Respondent's financial records showed that the store was having financial difficulty. However, he said that the Union had never before agreed to employee contributions, and that it was legally impossible for employees to make contributions to a multiemployer, defined benefit, Taft-Hartley pension plan.

At that point, Harb became very agitated and reiterated that he would never sign a collective-bargaining agreement; that he would rather close the store first. Papalardo, however, interceded, and said that Harb was just kidding. He specifically agreed to provide the Union with a comprehensive written proposal on behalf of Respondent. He also agreed to provide the bargaining unit information previously requested by McNair, which had not been provided with the financial information. (Tr. 560–568, 647–648, 655, 929–933, 964–965.)[30]

[28] Papalardo himself acknowledged this in his opening statement at the hearing. See Tr. 42–43 ("I am not a labor lawyer . . . what I do for a living is litigate cases and try to solve people's problems and bring people together"). See also Tr. 990 (acknowledging that he had never negotiated a collective-bargaining agreement before). However, to the extent Papalardo did so to suggest that one or more of Respondent's alleged violations in 2009 and 2010 should not be found because of his lack of labor law knowledge or experience, I reject that suggestion. It is well established that ignorance of the law is not a legally cognizable excuse. *Yoshi's Japanese Restaurant & Jazz House,* 330 NLRB 1339 fn. 3 (2000); and *MFP Fire Protection, Inc*., 318 NLRB 840, 842 (1995), enfd. 101 F.3d 1341 (10th Cir. 1996). This rule is particularly applicable to a lawyer's ignorance, as lawyers receive special training and are charged with special duties under State Bar rules of professional conduct. See, e.g., *Xu Yong Lu v. Ashcroft*, 259 F.3d 127, 135 (3d Cir. 2001). To paraphrase the Supreme Court in *Link v. Wabash Railroad Co*., 370 U.S. 626, 634 fn. 10 (1962), to absolve Respondent here because of the ignorance of its own attorney would visit the sins of Respondent's lawyer on the Charging Party and the unit employees.

[29] *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956); *Atlanta Hilton & Tower*, 271 NLRB 1600 (1984); and *Sumner Home*, 226 NLRB 976, 983 (1976), enfd. in relevant part 599 F.2d 762 (6th Cir. 1979).

[30] The foregoing findings are based on credited testimony by McNair and Papalardo. Although their accounts are not identical, there are few direct differences, i.e., there are few instances in which either specifically denied the account given by the other. However, where there are inconsistencies, I have given greater weight to McNair's testimony as McNair generally impressed me as the more reliable witness and his overall testimony was clear, specific, and at least generally confirmed in several important respects by Paplardo's testimony (Tr. 932–933,

Thereafter, on October 20, Papalardo requested a copy of the parties' prior labor agreements, which the Union emailed to him a few days later (GC Exh. 56; Tr. 568, 571, 647). The Union, however, did not receive either the bargaining unit information McNair had requested or a written proposal from Respondent. Accordingly, on November 10, 2009, McNair sent a letter to Papalardo warning that the Union would file another unfair labor practice charge unless both were provided within a week. (GC Exh. 55; Tr. 568–569.)

Papalardo responded several days later by email. He said he was still in the process of putting together a proposal. He noted in this regard that he had "recently" had his first child and was out of the office "for a while." He also noted that "I continue to have to answer numerous requests by the NLRB due to the complaint you filed against [Respondent]." He said he would provide a proposal by the end of the week.

As for the information request, Papalardo said Harb was still "pulling it together." He also asked McNair to "explain to me one more time the relevance of the request." McNair replied, "I do not know what could be more relevant than the terms and conditions of employment of the existing bargaining unit members—I guess it is self evident." (GC Exh. 57.)

As of a month later, the Union had still not received either a proposal or the requested bargaining unit information from Respondent. Accordingly, on November 27, 2009, the Union filed another unfair labor practice charge (Case 8–CA–38683). (GC Exh. 104; Tr. 570–574.)

In response to the Union's charge, by letter dated December 8, Papalardo advised the NLRB investigator that Respondent had, in fact, made a proposal to the Union—that employees contribute to paying for their benefits. As for the requested bargaining unit information, Papalardo stated that "the information the Union seeks should have no bearing on making a collective bargaining agreement." (GC Exh. 39.)

Nevertheless, about a week later, by letter dated December 14, Papalardo sent the requested information to the Union.[31] As for the promised proposal, however, he said that Respondent "would prefer to bargain face to face rather than exchange written 'supposals' and/or 'proposals'." (GC Exh. 58B & C.)

McNair responded to Papalardo by email the same day. He again requested that Papalardo "provide your client's written response to the Union's proposals and whether your client seeks to change any other term and condition of employment, and if so, what that proposed change is" (GC Exh. 58A). Papalardo, however, replied that he was "very leery" of McNair's "motivation" for requesting a written proposal because "everything I submit (whether verbal or written) is used against my client" by the Union. He specifically complained that the Union had filed an unfair labor practice charge even before the first bargaining session and that "everything said during negotiations is reiterated to the NLRB attorney examiner." However, he said he would have "a proposal" at the next session.

McNair responded by email on December 22. He noted that he was "not aware of any proposal, verbal or written, that your client has submitted, except that employees pay into the pension plan, which, as we advised your side, is illegal." He also noted that "getting your proposals in advance [of the next session] would help." Papalardo, however, declined to do so, again stating that he would make "a proposal" at the next session. (GC Exh. 59.)

The parties next met on January 5, 2010. Only Papalardo attended for Respondent; indeed, he advised McNair that Harb would never be there again. Papalardo also reiterated that he would not provide a written proposal because the Union would only use them to file charges as it had done in the past. Although he brought a written proposal with him to the meeting (GC Exh. 120), he did not give it to the Union because he did not think he had to, and because he did not trust the Union (Tr. 1009–1011).

Papalardo did, however, make several verbal proposals. With respect to health and welfare, he proposed that employees would pay 50 percent of the cost, and that new hires would have a 1-year waiting period. He also proposed that working spouses with their own coverage would not be covered. However, when McNair asked if this would include situations where the spouse's employer paid less than 50 percent of the cost, Papalardo said he was not sure. With respect to the pension, Papalardo proposed a 401(k) plan to be administered by the Union pension fund, with employees paying 50 percent of the contributions. However, when McNair informed him that the Union pension fund could not administer such a plan and that Respondent would incur a financial liability if it withdrew from the fund, Papalardo said he was not sure if Respondent wanted to make this proposal after all. Papalardo also proposed that all of Harb's family members by blood or marriage be exempt from both the pension and the health and welfare funds.[32]

Papalardo made a number of other verbal proposals as well, including raising the part-time classification to 37 hours,[33] paying new hires and students only the minimum wage, eliminating wage increases for all employees for the duration of the contract (1 year), and requiring employees to work 20 hours to qualify for holiday pay. He also proposed, for the first time, that Respondent would have "equal rights" in terminating employees. When McNair asked what this meant, Papalardo said he did not know, and declined to call Harb to find out.

964–965) and bargaining notes (GC Exh. 119). As for Harb, he denied that he even attended the October 12 meeting (Tr. 563). This, however, is contrary to the testimony of both McNair and Papalardo, and I therefore discredit it.

[31] Nine employees were listed, with their position, wage rate, and hire date.

[32] Like Levine's previous verbal proposal in early January 2008, the written proposal Papalardo brought to the January 5, 2010 meeting provided that students would be ineligible for the pension plan. However, as noted, Papalardo did not give the written proposal to the Union. Nor, apparently, did he make this proposal verbally.

[33] Krzys had previously offered this change at the initial, January 2007 bargaining session with Levine, as the Union had already agreed to it in the Cleveland major food industry multiemployer contract (which was the usual starting point for negotiations). The change was beneficial to the stores because it allowed them to employ fewer full-time workers and thereby pay less full-time benefits. See GC Exh. 7; and Tr. 222–223.

Papalardo also requested that the Union provide a wage proposal to Respondent. McNair objected to this request on the ground that Respondent had still not provided a comprehensive proposal to the Union. Nevertheless, McNair agreed to provide a wage proposal within a week. He also requested that Respondent provide certain information to clarify and/or enable the Union to evaluate the impact of Respondent's proposals. (GC Exhs. 60, 62, 67; Tr. 579–592, 1009–1011, 1020–1024, 1037–1040.)[34]

Later that same day, Papalardo sent McNair an email stating that Harb could not provide a timeline when the requested information could be completed. However, Papalardo again asked McNair for a wage proposal, as it would "have a bearing on the steps the employer will take with respect to the pension plan." He also asked the Union to withdraw its unfair labor practice charges. (GC Exh. 83.)

About 2 weeks later, on January 18, McNair emailed a typed summary of his bargaining notes from the January 5 bargaining session to Papalardo. It summarized each of Papalardo's verbal proposals, as well as the Union's verbal requests for information regarding those proposals. He also attached a written proposal from the Union. The proposal addressed both the previous 3-year period since February 2007, and the upcoming 3-year period through February 2013. It was essentially a modified version of the draft agreement Krzys had previously submitted on November 30, 2007. The most significant modification was that it eliminated the 30-cent pension increase the Union had previously proposed to maintain the employees' pension benefits. Instead, it included a so-called "default schedule," under which employees would receive less benefits and would no longer qualify for the "30-and-out" pension benefit. (GC Exhs. 60–62, 69; Tr. 592–600.)

As of February 10, the Union had received no response to this email.[35] Accordingly, McNair sent a letter to Papalardo again requesting the information it had verbally requested at the January 5 meeting and summarized in the January 18 email (GC Exh. 63). However, the Union also received no response to this letter. Accordingly, on March 18, McNair sent another letter again requesting the same information (GC Exh. 64). Respondent did not respond to this letter either. (Tr. 597–602.)

1. Respondent's delay in providing the requested bargaining unit information

As indicated above, the General Counsel alleges several 8(a)(5) violations based on the above facts, including that Respondent unlawfully delayed providing the bargaining unit information requested by the Union at the September 28, 2009 meeting and in subsequent correspondence; specifically, the names of employees currently in the bargaining unit and their job classifications, wage rates, and other terms and conditions of employment. I find that this allegation is supported by substantial evidence.

It is well established, and Respondent's answer admits, that bargaining unit information of the type requested by the Union is presumptively relevant. It is also well established that such relevant and necessary information must be furnished on request, without unreasonable delay. See, e.g., *El Paso Electric Co*., 355 NLRB No. 71, slip op. at 50–51 (2010) (3-month delay); *Bundy Corp*., 292 NLRB 671 (1989) (2 1/2-month delay); and *Woodland Clinic*, 331 NLRB 735, 737 (2000) (7-week delay).

Here, as discussed above, Respondent failed and refused to provide the requested employee information until December 14, after the Union filed an unfair labor practice charge over the matter and approximately 2 1/2 months after the Union's initial request. Respondent has offered no justification for this delay. Although its December 8 position statement argued that the information is irrelevant to collective bargaining, as indicated above both the law and Respondent's own recent answer to the consolidated complaint establish that the information is relevant. Further, Respondent's posthearing brief does not even address this allegation. Accordingly, I find that Respondent violated the Act as alleged.[36]

2. Respondent's failure to provide requested information about its proposals

The complaint also alleges that Respondent violated Section 8(a)(5) by failing and refusing to provide the relevant and necessary information the Union requested regarding Respondent's proposals at the January 5, 2010 meeting; specifically: (1) the names of all new hires and students; (2) the names and description of the familial relationship of the family members Respondent proposed should be exempt from the health and welfare and pension plans; (3) the meaning of Respondent's proposal that the employer shall have "equal rights" regarding terminations; (4) the maximum limitation, if any, on contributions to Respondent's proposed 401(k) plan; and (5) a copy of the pension and health and welfare contribution reports since February 1, 2008.[37]

Respondent's answer fails to admit or deny that the foregoing information is relevant and necessary; accordingly, under Section 102.20 of the Board's Rules, the allegation is deemed admitted. See, e.g., *Am-Pro Protective Agency, Inc*., 321 NLRB No. 90 (1996) (not reported in bound volumes). In any

[34] Papalardo testified that McNair also stated at some point during the January 5 meeting that the Union "could shut both of these stores [Church Square and Forest Hills] down if we really wanted to." See Tr. 44 and 975. And the Union's posthearing brief (p. 45) appears to concede this. However, as discussed above, I credit McNair and find that he initially made such a comment in response to Harb's statement at the previous, October 12 meeting that the Union was trying to put him out of business.

[35] Papalardo admitted at the hearing that he received the Union's email and proposal (Tr. 1037–1040). However, Harb testified that he never saw the Union's proposal (Tr. 846–847).

[36] The General Counsel's posthearing brief (pp. 71–72) also argues that the information Respondent belatedly provided on December 14 was incomplete. See also CP Br. at 43. However, this is inconsistent with the complaint (par. 13), which alleges only that Respondent "unduly delayed" providing the information, and that Respondent did, in fact, ultimately provide the requested information on December 14. Accordingly, I find it unnecessary to address the General Counsel's argument.

[37] Although the complaint incorrectly states that this information was requested on January 5, *2009*, the General Counsel corrected the date at the beginning of the hearing (Tr. 8).

event, I find that the relevance of the requested information relating to Respondent's proposals may properly be presumed (to the extent it sought unit information) or has been adequately demonstrated under the circumstances (to the extent it sought nonunit information). See *Castle Hill Health Care Center*, supra, 355 NLRB No. 196, slip op. at 24–27.

I further find that Respondent has failed to offer any legitimate justification for refusing to provide the information. In its answer, Respondent asserts that it was justified in not providing the information because the Union had "no intention of negotiating a successor agreement." In support, it cites McNair's statement that the Union could shut down the store if it wanted to, which Respondent asserts is clear evidence of "the Union's continued unconscionable conduct and failure to bargain in good faith" (GC Exh. 1(x), par. 14, and affirm. defense #5). It also cites the timing of the Union's unfair labor practice charges.[38]

These assertions, however, are baseless. The evidence shows that the Union vigorously pursued a new collective-bargaining agreement with Respondent by repeatedly requesting further bargaining sessions; timely providing Respondent with requested information; educating Respondent's new counsel regarding applicable labor laws and policies; submitting detailed written proposals to Respondent; and substantially modifying its proposals to address Respondent's financial problems and concerns.

As for McNair's statement, even assuming it could be construed as a threat to strike or picket the store, there is nothing "unconscionable" about it. Indeed, the right of employees to engage in such concerted activity against their employer is guaranteed by Section 7 of the Act and is an integral part of the overall collective-bargaining scheme created by Congress. See also NLRA Secs. 2(3), 8(b)(4)(B), and 13. It coexists with the duty to bargain in good faith set forth in Section 8(b)(3) of the Act; it is not inconsistent with it. See *NLRB. v. Insurance Agents,* 361 U.S. 477, 489 (1960).

Finally, contrary to Respondent, I also find that no inference of bad faith or improper motive is warranted by the timing of the Union's unfair labor practice charges. As indicated above, the Union gave Respondent ample warning that the charges would be filed if Respondent did not respond to its requests in a timely manner, and Respondent ignored those warnings.

In short, as with the Union's prior request for financial information, the record as a whole indicates that the Union requested information about Respondent's proposals to fulfill its rights and duties as the employees' exclusive bargaining representative; i.e. to "knowledgably evaluate" Respondent's positions and proposals, and not for any improper purpose. *Harmon Auto Glass*, supra, 352 NLRB at 154. Accordingly, I find that Respondent violated the Act as alleged.

[38] See Respondent's April 12, 2010 position statement (GC Exh. 42), and Papalardo's opening statement and testimony (Tr. 30–46, 1005, 1026, 1037–1040). As with the September 28, 2009 information request, Respondent's posthearing brief does not directly address the January 5, 2010 information request.

3. Respondent's failure to bargain in good faith over a successor agreement

The complaint also alleges that Respondent violated Section 8(a)(5) by bargaining in bad faith over a successor agreement since August 18, 2009. I find that a preponderance of the evidence supports this allegation as well.

In evaluating whether an employer has bargained in bad faith, the totality of its conduct is examined. This includes both its conduct at the bargaining table (for example, whether it made regressive proposals, failed or refused to timely provide relevant bargaining information, or made antiunion statements), and its conduct away from the bargaining table (for example, whether it made unilateral changes in terms and conditions of employment). See, e.g., *Oklahoma Fixture Co*., 331 NLRB 1116, 1117 (2000), enfd. 332 F.3d 1284 (10th Cir. 2003) (en banc); *U.S. Ecology Corp.*, 331 NLRB 223, 225–226 (2000), enfd. 26 Fed. Appx. 435 (6th Cir. 2001) (unpub.); and *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984).

In agreement with the General Counsel, I find that the totality of Respondent's conduct here establishes that it bargained in bad faith with no intention of reaching an agreement. As discussed above, Respondent had previously ceased making benefit fund contributions for all unit employees and changed their health insurance provider without ever proposing these particular changes during negotiations or bargaining to a bona fide impasse. Although it subsequently entered into a non-Board settlement in late 2008 whereby it agreed to reverse and remedy these changes and resume bargaining with the Union, it failed to comply with the settlement. Further, when Respondent did eventually return to the bargaining table in late 2009, Respondent's owner (Harb) announced—after only one additional bargaining session and before providing the Union with requested financial information or a comprehensive proposal—that the parties were too far apart; that he would not sign an agreement; and that he would rather close the store before doing so.[39] As indicated above, although Papalardo assured the Union that Harb was "just kidding," Respondent thereafter delayed for 2 1/2 months providing the Union with requested bargaining unit information necessary for meaningful collective bargaining, refused to provide the Union with a comprehensive written proposal (despite Papalardo's previous promise to do so), and made a verbal proposal at the last session on January 5 that included, for the first time, a regressive provision that would give Respondent "equal rights" to discharge employees—language that Papalardo himself could not define or explain. Moreover, Respondent thereafter failed or refused to provide the Union with requested information about this and its other verbal proposals.[40]

[39] As discussed below, the General Counsel alleges, and I find, that this statement independently violated Section 8(a)(1) of the Act. However, even in the absence of such a finding, the statement supports the General Counsel's allegation that Respondent negotiated in bad faith with no intention of reaching an agreement. See, e.g., *U.S. Ecology Corp.*, 331 NLRB 223, 225–226 (2000), enfd. 26 Fed. Appx. 435 (6th Cir. 2001) (unpub.); and *Leeds Cablevision*, 277 NLRB 103 (1985), enfd. mem. 835 F.2d 1438 (11th Cir. 1987).

[40] The General Counsel also cites a July 24, 2009 position statement (GC Exh. 107), which Papalardo filed with Judge Polster in the Federal

Respondent's posthearing brief (pp. 10–11) argues generally that the various verbal proposals Papalardo made to the Union on January 5 were justified by "the severe financial constraints that [Respondent] was under and the need to readjust any perceived concessions previously made." It also argues that Respondent's good faith is evidenced by Papalardo's repeated suggestion that Judge Polster serve as a mediator in the parties' negotiations. However, while Respondent's financial condition might explain some of the wage and benefit proposals Papalardo made on January 5,[41] it would not on its face explain the "equal rights"-to-discharge proposal. Further, whatever Papalardo's motivation for suggesting that Judge Polster serve as mediator, the suggestion is insufficient by itself to outweigh the other, substantial evidence discussed above that Respondent had no intention whatsoever of executing a new agreement with the Union. Cf. *APT Medical Transportation, Inc.*, 333 NLRB 760 fn. 3 (2001) (disavowing judge's reliance on employer's request for federal mediator in finding good faith).[42]

4. Respondent's threat to close the store rather than sign an agreement

Finally, the General Counsel alleges that Harb's statement at the October 12 meeting, that he would rather close the store than sign an agreement, independently violated Section 8(a)(1) of the Act. See Exh. 1(q), paras. 12(B)(4) and 16; GC Br. 67 and 89. I find that a preponderance of the evidence supports this allegation as well. As indicated above, Harb is Respondent's owner and president, and the surrounding circumstances before, during, and after the October 12 meeting belie that his statement was made in jest or merely an isolated comment during the heat of bargaining. Further, Harb made the statement directly to the unit employees' designated bargaining agent (McNair),[43] and therefore "under such circumstances as to insure that the employees would learn of" it. *Reeves-Ely Laboratories, Inc*., 76 NLRB 728, 733 (1948). See also *National Assn. of Government Employees*, 327 NLRB 676, 680 (1999), enfd. mem. 205 F.3d 1324 (2d Cir. 1999), and cases cited there. Finally, Respondent has offered no response to this allegation in its answer or posthearing brief other than its general, meritless defenses discussed above. Accordingly, in agreement with the General Counsel, I find that the statement would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their statutory rights.

CONCLUSIONS OF LAW

1. By unilaterally failing to make pension and health and welfare contributions for certain unit employees from September 6, 2007 through January 31, 2008, and unilaterally failing to make such contributions for all unit employees and changing their health insurance provider since February 1, 2008, Respondent unlawfully refused to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act.

2. Respondent also violated Section 8(a)(5) and (1) of the Act by unreasonably delaying for 2 1/2 months before providing the Union with the relevant and necessary bargaining unit information it requested on September 28, 2009, refusing to provide the Union with the relevant and necessary information

court case and subsequently provided to counsel for the General Counsel on July 9, 2010, in response to a trial subpoena served June 18, 2010. The position statement advised Judge Polster that Respondent would abide by the terms of the non-Board settlement agreement it had previously signed, "but in return would like [the Union] removed from representing its employees." At trial, Papalardo objected to admission of this three-page document on the grounds that: (1) it was protected by the work product privilege; (2) the privilege had not been waived by submitting the document to Judge Polster as it was submitted confidentially, without service on the other parties to the litigation, in preparation for a scheduled settlement conference, pursuant to Judge Polster's order (R. Exh. 1); and (3) under FRE 502(b), the privilege had also not been waived by disclosure to counsel for the General Counsel in response to the trial subpoena because the disclosure was inadvertent, he had taken reasonable steps to prevent disclosure, and he also promptly took reasonable steps to rectify the error. However, after taking sworn testimony and hearing argument on the matter, I overruled Respondent's objection and admitted the document. Specifically, in agreement with the General Counsel and the Charging Party, I found that Respondent had failed to show that the disclosure was "inadvertent" within the meaning of FRE 502(b), as Papalardo admitted that he personally went through the documents at least twice and looked at each document before disclosing them in response to the subpoena; the number of documents disclosed was not unusually large (numbering in the hundreds rather than the thousands, and filling at most one box); the document had been authored and signed by Papalardo himself and was clearly labeled (in bold capital letters) that it was Respondent's position statement to the Federal court; and Respondent admittedly did not file a petition to revoke the subpoena to the extent it encompassed any privileged documents. In short, I found that the circumstances indicated that Papalardo knowingly and intentionally disclosed the document, notwithstanding that it constituted his work product, and only later realized that he should not have done so because it had been submitted confidentially to the court and/or was damaging to his client. In addition or alternatively, I found that Papalardo had failed to take reasonable steps to prevent disclosure. See generally *Amobi v. D.C. Dept. of Corrections*, 262 F.R.D. 45 (D.D.C. 2009). Finally, I found that the document was not protected under FRE 408 (Offers to Compromise) because the General Counsel was not offering the statements therein as admissions of the conduct alleged in the Federal court lawsuit, but rather as evidence of Respondent's antiunion animus. See *R. Sabee Co*., 351 NLRB 1350 fn. 3 (2007), citing *Uforma/ Shelby Business Forms v. NLRB*, 111 F.3d 1284, 1293–1294 (6th Cir. 1997); and *Vulcan Hart Corp. v. NLRB*, 718 F.2d 269, 276–277 (8th Cir. 1983). (Tr. 1280–1286.) In its posthearing brief (pp. 11–20), Respondent continues to argue that the document's admission was improper under FRE 502(b) and that it should be stricken. I reject Respondent's arguments and reaffirm my ruling. However, while I agree with the General Counsel that Respondent's position statement adds further support to the alleged violation, I would find the violation even without considering the statement.

[41] The complaint alleges that several of these other proposals were also regressive and evidenced Respondent's bad faith, including Respondent's proposed language on holiday pay, changing to an employee copay healthcare system, converting from the Union pension plan to a 401(k) plan, and changing the wage structure. However, in light of my conclusion regarding the "equal rights" proposal and my other findings, it is unnecessary to address these allegations as it would not significantly affect the result or the remedy.

[42] It is unclear what powers Papalardo contemplated that Judge Polster would have had as a "mediator" of the parties' negotiations. However, a federal mediator normally provides guidance only and has no authority to impose a settlement agreement on the parties. See http://www.fmcs.gov/internet/itemDetail.asp?categoryID=141&itemID=15911.

[43] Union officer Tim Fergus was also present (Tr. 563).

it requested on January 5, 2010 concerning Respondent's proposals, and otherwise bargaining in bad faith, with no intention of reaching a successor collective-bargaining agreement since August 18, 2009.

3. By threatening on October 12, 2010, that it would rather close the store than sign a new collective-bargaining agreement, Respondent also independently violated Section 8(a)(1) of the Act by interfering, restraining, and coercing employees in the exercise of their Section 7 rights.

4. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

5. Respondent did not violate the Act by conditioning any agreement on the Union limiting or stopping an audit of Respondent's books by the pension fund.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that Respondent unlawfully ceased making contributions to the Union pension and health and welfare funds on behalf of some unit employees since September 6, 2007, and ceased making such contributions on behalf of all unit employees and changed their health insurance carrier since February 1, 2008, I shall order Respondent to make whole its unit employees by making all such delinquent contributions on behalf of eligible unit employees that have not been made since those dates,[44] including any additional amounts due the funds in accordance with *Merryweather Optical Co.,* 240 NLRB 1213, 1216 fn. 7 (1979).[45] I shall also order Respondent to reimburse the unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest compounded daily as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

Further, I shall order Respondent, on request of the Union, to restore the status quo ante that existed prior to February 1, 2008 by rescinding the change in the health insurance provider and continuing to make timely contributions to the Union pension and health and welfare funds on behalf of all eligible unit employees unless and until such time as it bargains with the Union in good faith to a contrary agreement or bona fide impasse.[46]

In addition, having found that Respondent violated Section 8(a)(5) and (1) of the Act by bargaining in bad faith with no intention of reaching a successor agreement since August 2009, I shall order Respondent, on request, to bargain in good faith with the Union. I shall also order Respondent to provide the Union with the information it requested January 5, 2010.

Finally, I shall order Respondent to post a notice to employees in accordance with *J. Picini Flooring*, 356 NLRB No. 9 (2010).

Accordingly, on the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[47]

ORDER

The Respondent, Landmark Family Foods, Inc., d/b/a Church Square Supermarket, Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with United Food and Commercial Workers Union Local 880 over a successor collective-bargaining agreement covering the employees in the following appropriate unit: All food store and meat department employees, but excluding regular clerical personnel, managers, and other supervisors as defined in the Act.

(b) Failing and refusing to timely make required contributions to the Union pension and health and welfare funds on behalf of eligible unit employees, and/or unilaterally changing the health insurance carrier, without bargaining with the Union in good faith to an agreement or bona fide impasse.

(c) Failing and refusing to timely provide the Union with requested information that is relevant and necessary to the Union's role as the exclusive bargaining representative of the unit employees.

(d) Threatening to close the store rather than sign a new collective-bargaining agreement covering the unit employees.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit em-

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[44] The General Counsel acknowledges that Respondent made some of the delinquent pension and health and welfare contributions on behalf of eligible employees in November 2008, for the period September 1, 2007 through January 31, 2008, pursuant to the Federal court settlement. See GC Exh. 1(q), par. 9(E); and GC Br. 34–35.

[45] To the extent that an employee has made personal contributions to a benefit or other fund that have been accepted by the fund in lieu of Respondent's delinquent contributions during the period of the delinquency, Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to any amount that Respondent otherwise owes the fund.

[46] Respondent may litigate in compliance whether it would be unduly burdensome to restore the health insurance coverage in effect prior to the unilateral change. See *Pavilions at Forrestal*, 353 NLRB 540, 544 fn. 7 (2008), reaffirmed and incorporated by reference 356 NLRB No. 6 (2010) (permitting employer to litigate in compliance whether it would be unduly burdensome to restore the employees' prior health insurance coverage provided through the union health and welfare fund pursuant to the parties' expired collective bargaining agreement). But cf. *Lewis Goldman Wood Products,* 351 NLRB No. 66 (2007) (not reported in bound volumes); and *Duane Reade,* 342 NLRB 1016 (2004). If the Union chooses to retain the unilaterally implemented health insurance policy, then make-whole relief for the unilateral change is inapplicable. *Pavilions at Forrestal*, supra (citing *Brooklyn Hospital Center*, 344 NLRB 404 (2005)).

[47] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ployees over their terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement.

(b) Make all delinquent contributions to the Union pension fund and health and welfare funds on behalf of unit employees that have not been made since September 6, 2007, including any additional amounts due the funds, as set forth in the remedy section of this decision.

(c) Make unit employees whole for any expenses ensuing from its failure to make the required pension and health and welfare contributions, with interest, as set forth in the remedy section of this decision.

(d) Rescind its change in the health insurance carrier and continue making required contributions to the Union pension and health and welfare funds on behalf of eligible unit employees unless and until it has bargained in good faith to a new agreement or bona fide impasse.

(e) Furnish the Union with the information it requested on January 5, 2010.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Cleveland, Ohio, copies of the attached notice marked "Appendix."[48] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 6, 2007.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 2, 2010

[48] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT fail or refuse to bargain in good faith with United Food and Commercial Workers Union Local 880 over a successor collective-bargaining agreement covering employees in the following appropriate unit: All food store and meat department employees, but excluding regular clerical personnel, managers, and other supervisors as defined in the Act.

WE WILL NOT fail or refuse to timely make required contributions to the Union pension and health and welfare funds on behalf of eligible unit employees, or unilaterally change the health insurance carrier, without bargaining with the Union in good faith to an agreement or bona fide impasse.

WE WILL NOT fail or refuse to timely provide the Union with requested information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

WE WILL NOT threaten to close the store rather than sign a new collective-bargaining agreement covering the unit employees' terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Union and put in writing and sign any agreement reached on terms and conditions of employment for the unit employees.

WE WILL make all delinquent contributions to the Union pension fund and health and welfare fund on behalf of unit employees that we have not made since September 6, 2007, including any additional amounts due the funds.

WE WILL make unit employees whole for any expenses resulting from our failure to make the required pension and health and welfare contributions, with interest.

WE WILL rescind our change in the health insurance carrier and continue making required contributions to the Union pension and health and welfare funds on behalf of eligible unit employees unless and until we have bargained in good faith to a new agreement or bona fide impasse.

WE WILL furnish the Union with the relevant and necessary information it requested on January 5, 2010.

LANDMARK FAMILY FOODS, INC., D/B/A CHURCH SQUARE SUPERMARKET